

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 92-1465

(Summary Calendar)

DANIEL GLENN STEADHAM,

Petitioner-Appellant,

VERSUS

JAMES A. COLLINS, Director,
Texas Dept. of Criminal Justice,
Institutional Division,

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Texas
(CA4-89-556-A)

(May 2, 1994)

Before JOLLY, WIENER, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

Daniel Glenn Steadham appeals the district court's denial of his petition for a federal writ of habeas corpus under 28 U.S.C. § 2254 (1988). Steadham was convicted of armed robbery in a Texas court, and is now in the custody of the Texas Department of Criminal Justice. Steadham sought federal habeas relief on the grounds that he was denied effective assistance of counsel at

* Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

trial. The district court denied Steadham's petition, because Steadham had not shown that the outcome of his state trial would have been different but for his trial counsel's alleged errors. Because the district court correctly determined that Steadham failed to demonstrate prejudice, we affirm.

I

A

Teresa Wilson was working at Parton's Pizza in Fort Worth around 9:50 or 10:00 p.m. when a man came in and said he needed change. As Wilson walked toward the cash register, she noticed that the man was following her behind the register, and that he had a gun in his hand. The man took the money from the cash register and left. Wilson later identified Steadham as the robber in a photo spread, at a lineup, and at trial. Two customers who witnessed the robbery also identified Steadham as the perpetrator at trial.

Daniel Guerrero saw a man climbing a fence at a house near Parton's Pizza on the night of the robbery. Later Daniel saw the same man running through a yard on Rio Vista street, carrying a nickel plated gun. Daniel's mother, Grace Guerrero, also saw the man running, carrying "something flashy . . . like a gun." Grace and Daniel observed a pickup truck, which had been parked on Rio Vista, start up and begin to move, at which point the running man jumped in the moving truck and rode away. At trial Daniel identified Steadham as the man he had seen climbing the fence and running with the gun.

Steadham testified that he was giving his cousin, Jimmy Dow Musick, a ride to Musick's girlfriend's house when his truck broke down near Parton's Pizza at about 9:20 p.m.¹ Steadham testified that he coasted onto Rio Vista and stopped the truck to make repairs, and then had to wait for the engine to cool before he could start the truck again. According to Steadham, Musick decided to walk to his girlfriend's house, and left before the truck had cooled down. Steadham testified that around 9:30 p.m., as he was waiting for the truck to cool down, he was approached by a man who lived nearby. According to Steadham's testimony, he had a conversation with this man for 30 to 35 minutes, and then the man left him at 10:00 or 10:10 p.m. Steadham testified that he started the truck and began to drive away at 10:20 or 10:25 p.m., at which point Musick stepped out in front of the truck and waved him down, and they drove away.

At trial a police officer testified that he and Steadham were at Fort Worth City Hall, on the way to the robbery office, when Steadham "said he was the one that robbed Parton's Pizza on the day in question."

B

Steadham was tried before a jury and convicted of armed robbery. After his conviction was affirmed on direct appeal, Steadham filed a petition for a federal writ of habeas corpus, contending that his trial counsel, Clyde Marshall, was ineffective

¹ Steadham testified at trial and at the hearing on his habeas petition.

for failing to contact, interview, or call as witnesses at trial Raymond Godfrey, Jimmy Dow Musick, Eddie Musick, or Dale Darwin Steadham.²

Raymond Godfrey was the man Steadham spoke to on Rio Vista while waiting for his truck to cool down. Godfrey was not called to testify at Steadham's trial, but he later stated in an affidavit that he observed an old pickup truck on Rio Vista on the night of the robbery and "walked down to it to see what the trouble was" at about 9:30 p.m. Godfrey's affidavit describes his conversation with Steadham as follows:

The young man introduced himself to me by name, which name I do not now recall, but he was the same man Fort Worth Detective Yale had me identify from a line-up at a later date. The young man told me his pickup was stalled and was too hot to start, and he was waiting for it to cool down enough to start it. I walked on back to my house, but then continued to watch the pickup until it started and left several minutes later. This man that I met at the pickup stayed with his vehicle, and never left it from the time I talked to him until he later got it started and drove up the street.

Godfrey's affidavit also stated that he would have testified at trial if he had been called. Steadham argued that Godfrey's testimony would have provided an alibi, and that Marshall was therefore ineffective for failing to procure that testimony.

Jimmy Dow Musick, Steadham's cousin, was with him on the night of the robbery. Steadham alleged that Musick had confessed to various relatives that he committed the robbery. Among the

² Steadham's petition specifically mentioned only Raymond Godfrey. However, at the hearing on the petition, Judge McBryde permitted Steadham's counsel to "supplement" the written petition orally. The state's attorney did not object.

relatives to whom Musick allegedly confessed were his uncle, Eddie Musick, and Steadham's brother, Dale Darwin Steadham. Therefore, Steadham argued, Marshall was ineffective for failing to contact and call as witnesses Jimmy Musick, Eddie Musick, and his brother Dale Steadham.

The district court held an evidentiary hearing concerning these alleged errors on the part of Steadham's trial counsel. Following the hearing, the district court stated that it could not "conclude that [Steadham] did not receive a fair trial," or "that but for conduct on the part of Mr. Marshall, the trial results would have been different." The district court therefore denied Steadham's petition. Steadham appeals.

II

In order to prevail on his claim of ineffective assistance of counsel, Steadham must show that (1) his counsel's performance was deficient, and (2) counsel's deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984). To demonstrate prejudice, Steadham must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694, 104 S. Ct. at 2068. Because the record does not support the conclusion that Steadham's trial probably would have come out differently if not for Marshall's alleged errors, the district court correctly rejected Steadham's ineffective assistance claim.

Steadham contends that Raymond Godfrey could have provided a convincing alibi, resulting in an acquittal, by corroborating his testimony that he was sitting in his truck on Rio Vista waiting for it to cool when Parton's Pizza was robbed. However, nothing in the record indicates Godfrey would have testified as to Steadham's whereabouts at the time of the robbery. In his affidavit Godfrey stated that he spoke to Steadham around 9:30, but he did not indicate how long they spoke: Godfrey merely stated that Steadham introduced himself and explained the trouble with his vehicle. Testimony to that effect would not have corroborated Steadham's story that he was still sitting in his truck on Rio Vista when the robbery occurred at 9:50 or 10:00 p.m.³ Therefore, Godfrey's testimony, as represented in his affidavit, would have been consistent with the state's theory that Steadham was at Parton's

³ Godfrey also stated that after he spoke to Steadham he "walked on back to [his] house, but then continued to watch the pickup until it started and left several minutes later," and that Steadham "stayed with his vehicle, and never left it from the time [Godfrey] talked to him until he later got it started and drove up the street." Because Godfrey did not say how long he talked to Steadham, the foregoing does not reveal when Steadham left Rio Vista street.

Pizza at the time of the robbery,⁴ and the outcome of Steadham's trial would not have been different if Godfrey had testified.

Neither does the record suggest that the outcome of the trial probably would have been different if Musick had been called as a witness. As Steadham forthrightly concedes, the record does not support the conclusion that Musick would have taken the stand and confessed to the robbery.⁵ However, Steadham contends that if Musick had taken the stand and not confessed, at least the jury could have observed the resemblance between Musick and Steadham and realized that the eye witnesses to the robbery mistook Steadham for Musick. Steadham's argument is not supported by the record, which reveals only a slight resemblance between Musick and Steadham: one had light brown hair, the other dishwater blond; and both men were about 5 feet 7 inches tall.⁶ Therefore, the record does not

⁴ Godfrey's expected testimony would have been consistent with Steadham's guilt, and with the testimony of Grace and Daniel Guerrero, see *supra* part I.A., if Steadham (1) stopped on Rio Vista around 9:30 p.m.; (2) spoke briefly to Godfrey, then started the truck and drove away; (3) then robbed Parton's Pizza; and (4) finally ran back to Rio Vista where Musick was waiting in the truck. This scenario is plausible because Parton's Pizza is very close to the area on Rio Vista where Steadham was seen by Godfrey and the Guerreros. Grace Guerrero testified that she was at a neighbor's house, four houses down from her own home, when she saw the man run and jump into the moving pickup. Ms. Guerrero also testified that Parton's Pizza was about 35 yards from her home.

⁵ In fact, Steadham testified at the evidentiary hearing that he and attorney Marshall met with Musick before trial, and Musick told them "he wouldn't get up on the stand and tell them he did it."

⁶ Steadham argues that photographs of the two men, admitted as exhibits at the evidentiary hearing, reveal a strong resemblance. However, the exhibits contained in the record are merely photocopies of the referenced photographs, and the photocopies reveal nothing about the appearance of either Musick or

suggest that Steadham probably would have been acquitted if Musick had been called as a witness and viewed by the jury.⁷

Lastly, Steadham argues that Marshall was ineffective for failing to call Eddie Musick and Dale Darwin Steadham to testify that Jimmy Dow Musick confessed to robbing Parton's Pizza. Assuming *arguendo* that Eddie and Dale would have so testified, we are not persuaded that Steadham probably would have been acquitted had they been called. It is not reasonably probable that the jury would discredit the evidence against Steadham))positive identification by four eye witnesses, and a confession to a law enforcement officer))on account of Jimmy Dow Musick's confession to Eddie Musick and Dale Darwin Steadham.

Because we agree that Steadham failed to show prejudice from his trial counsel's alleged errors, we **AFFIRM**.

Steadham.

⁷ Steadham argues that calling Musick would have been helpful because it would have permitted Eddie Musick and Dale Darwin Steadham to testify that Musick confessed to robbing Parton's Pizza. Because we decide that Eddie Musick's and Dale Steadham's testimony to that effect would not have changed the outcome of Steadham's trial, *see infra*, we need not address this issue.